

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

In Re:  
PHARMACEUTICAL INDUSTRY ) CA No. 01-12257-PBS  
AVERAGE WHOLESALE PRICE ) MDL No. 1456  
LITIGATION ) Pages 1 - 49

MOTION HEARING

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
February 27, 2007, 10:10 a.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 3205  
Boston, MA 02210  
(617)345-6787

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1 APPAREANCES:  
 2 For the Plaintiffs:  
 3 RENEE' BROOKER, ESQ. and GEJAA T. GOBENA, ESQ., United  
 4 States Department of Justice, Civil Division, Commercial  
 5 Litigation, Fraud, 601 D Street, N.W., Washington, D.C.,  
 6 20004.

7 JAMES J. BREEN, ESQ., 3562 Old Milton Parkway,  
 8 Alpharetta, Georgia, 30005, for the Relator, Ven-A-Care of  
 9 the Florida Keys.

10 For the Defendants:  
 11 JAMES R. DALY, ESQ., Jones Day,  
 12 77 West Wacker, Chicago, Illinois, 60601-1692, for Abbott  
 13 Laboratories.

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1 obviously different pharmaceutical manufacturers, different  
 2 drugs, but those are Dey and Roxane, and I do not believe  
 3 that Roxane is before the Court. The United States did file  
 4 an unopposed motion -- I believe it may have been Friday --  
 5 to transfer a third case before your Honor.

6 THE COURT: Now, does it make some sense -- how old  
 7 are those other two cases?

8 MS. BROOKER: They're about the same age, your  
 9 Honor, as the Abbott case.

10 THE COURT: Does it make some sense to put you all  
 11 into some sort of a lockstep?

12 MS. BROOKER: It does make sense to us, your Honor,  
 13 yes.

14 MR. DALY: From our perspective, it does not,  
 15 Judge, for the following main reason: I mean, we've been at  
 16 this since the spring. We have a discovery cutoff of the end  
 17 of this year to 12/31/07. My understanding, although I'm not  
 18 directly privy to the conversations that the United States  
 19 has had with the other defendants, but I believe they are  
 20 agreeing to much longer time periods to deal with their case.

21 THE COURT: So you think it's -- so bring me up  
 22 to -- this is why I brought you all in here.

23 MR. DALY: Right.

24 THE COURT: This is somewhat, I have to say I'm  
 25 sorry, a court mistake. This somehow ended up in purgatory

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1 PROCEEDINGS

2 THE CLERK: In re: Pharmaceutical Industry Average  
 3 Wholesale Price Litigation, Civil Action 01-12257, will now  
 4 be heard before this Court. Will counsel please identify  
 5 themselves for the record.

6 MS. BROOKER: Good morning, your Honor. Renee'  
 7 Brooker on behalf of the United States. I'm from the  
 8 Commercial Litigation Branch in Washington, D.C. at Main  
 9 Justice.

10 MR. BREEN: Jim Breen on behalf of the Relator,  
 11 Ven-A-Care of the Florida Keys.

12 MR. GOBENA: Gejaa Gobena on behalf of the United  
 13 States.

14 MR. DALY: Good morning, your Honor. Jim Daly on  
 15 behalf of Abbott Laboratories.

16 THE COURT: Now, this is just against Abbott?

17 MR. DALY: Yes, your Honor.

18 MS. BROOKER: This particular case, yes, your  
 19 Honor.

20 THE COURT: That sends chills down my spine. So  
 21 are there others? I know I've got a couple of other  
 22 intervenor cases.

23 MS. BROOKER: That's right, your Honor.

24 THE COURT: And what do those involve?

25 MS. BROOKER: They involve the same issues,

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1 between the United States Magistrate Judge and me, with me  
 2 thinking she was going to handle it and she thinking that I  
 3 was going to handle it. And the reality is that we both  
 4 talked, and I brought it back up here because I understood it  
 5 was part of a bigger picture, so --

6 MS. BROOKER: It is, your Honor.

7 THE COURT: So I probably should hear what's been  
 8 happening so far, you know, like, what needs to happen to  
 9 bring this case to the point where --

10 MS. BROOKER: Yes, your Honor, and I think I can  
 11 give you a brief overview of where the parties are at.

12 The United States and Abbott and relator Ven-A-Care  
 13 have been proceeding with discovery in this case. A couple  
 14 depositions have been taken. There are deposition notices  
 15 outstanding, document requests, interrogatories. Requests  
 16 for admissions have been served. At the time that Dey joined  
 17 a few months ago, we have been attempting to, and Dey has  
 18 been cooperative, in trying to coordinate at least with  
 19 respect to the deposition discovery that's being taken  
 20 against the United States.

21 THE COURT: Let me stop you right there. When you  
 22 say Dey joined, it's a separate action against Dey?

23 MS. BROOKER: Yes, it is.

24 THE COURT: So you just mean sort of informal  
 25 coordination?

<p style="text-align: right;">Page 6</p> <p>1 MS. BROOKER: Yes, we have been coordinating. Dey 2 has been coordinating. We have been notifying Dey about 3 depositions against government witnesses. They have 4 appeared, I believe, at the first two depositions. We also, 5 the United States, whenever we serve documents pursuant to 6 document requests upon Abbott, we also send a copy to Dey, 7 and so there has been some coordination going on.</p> <p>8 Now, I will tell the Court that the parties, Abbott 9 and the United States and relator, came here this morning 10 with the intent of informing the Court in the first instance 11 that we believe we have substantially, although I want to 12 carve out a big significant issue, but we have substantially 13 agreed upon a case management order. We've been working on 14 this for the last several months. We were working on it all 15 the way up until the time, you know, ten minutes outside of 16 the courthouse. I think that we, again, carving out one 17 issue that we would like to raise, we can present the Court 18 with a proposed CMO that does just apply to this case.</p> <p>19 THE COURT: Okay.</p> <p>20 MR. DALY: That's correct, your Honor.</p> <p>21 THE COURT: So what's the big remaining issue?</p> <p>22 MS. BROOKER: Okay, this is the big remaining 23 issue, your Honor.</p> <p>24 THE COURT: Of course, without knowing the rest of 25 what you agreed on, it might be --</p>	<p style="text-align: right;">Page 8</p> <p>1 talk about CMO 9 which the Court entered, which very clearly 2 states in Paragraph 3 that any governmental plaintiff that 3 comes into these cases gets what has been produced in other 4 cases to the extent they relate to the drugs that the 5 governmental entity has sued upon. Our problem with this is 6 that if you take Texas, for example, the state court action 7 in Texas, they've sued Abbott for all kinds of drugs, branded 8 drugs. The government suit is only four generics. Texas has 9 sued for hundreds of drugs.</p> <p>10 THE COURT: Well, I suppose you both have a good 11 point, but what about what I would call crosscutting 12 documents about, you know, like mode of operation and 13 marketing techniques or something?</p> <p>14 MR. DALY: Right, and your order provides for that, 15 Judge. I didn't mean that -- I wasn't done, but it talks 16 about drugs that have been sued on or otherwise relevant to 17 the complaint, and we have not withheld the kind of documents 18 that the Court just described.</p> <p>19 MS. BROOKER: We take great issue with that, your 20 Honor. If I may --</p> <p>21 THE COURT: But you're not entitled to every drug 22 if you haven't sued on it.</p> <p>23 MS. BROOKER: Well, your Honor, two points I would 24 like to make. First, I'd like to address that. I'd also 25 like to say that Mr. Breen, who is the relator in a Texas</p>
<p style="text-align: right;">Page 7</p> <p>1 MR. DALY: We'll walk through that with your Honor 2 and make sure your Honor agrees.</p> <p>3 MS. BROOKER: Yes, basically just to summarize, we 4 have largely agreed to parameters for discovery; you know, 5 discovery limitations, numerical limitations largely. We've 6 agreed to deposition protocols, document production protocols 7 primarily.</p> <p>8 The significant issue that we would like to bring 9 to the Court's attention today is an issue that has prevented 10 the United States from moving forward with discovery. Abbott 11 has served initially in this case a set of initial 12 disclosures. The United States has been attempting for 13 months now, since we appeared before your Honor on 14 August 26 when your Honor said, "I'm going to open up 15 everything that's happened in the MDL proceeding," we served 16 document requests, and we've asked repeatedly Abbott to 17 provide to us a set of materials that it has produced in 18 other AWP cases, including in this case pursuant to CMO 5 and 19 pursuant to CMO 7. We have a small subset of those 20 materials. Abbott has obstructed us from --</p> <p>21 THE COURT: Well, without using the verbs, why 22 don't you produce them?</p> <p>23 MR. DALY: Your Honor, the reason for it is that 24 the United States has only sued us for four drugs. This 25 court has -- they talk about CMO 5 and 10, but they never</p>	<p style="text-align: right;">Page 9</p> <p>1 state action, would like to address the Court on this issue 2 because he has information that he needs to provide the Court 3 on this. But we do believe, your Honor, we have two problems 4 with this. Number one, the MDL private plaintiffs in this 5 case have a set of documents that we know are relevant in 6 this litigation. All Abbott has to do is burn a copy of the 7 CD-ROMs and provide it to us.</p> <p>8 THE COURT: Well, like what? What do you know 9 you --</p> <p>10 MS. BROOKER: Well, I would allow Mr. Breen to 11 address that because he is also in the Texas case. And in 12 the Texas case, the relator and the State of Texas had to 13 move to compel Abbott to produce documents on numerous 14 occasions. Abbott attempted to vacate the trial court's 15 order by seeking several writs of mandamus that went all the 16 way up to the Supreme Court of Texas on two occasions. 17 That's how much --</p> <p>18 THE COURT: What are the documents? In other 19 words, let me put it this way. I generally believe the 20 following: You're not entitled to documents on any single 21 drug if you haven't charged it. You are entitled to do 22 discovery beyond the four drugs to the extent it shows that 23 there's some practice or pattern of conduct.</p> <p>24 MS. BROOKER: That's right.</p> <p>25 THE COURT: Now, where it falls in between, I'm not</p>

<p style="text-align: right;">Page 10</p> <p>1 sure how to do that. Perhaps one thing would be --  2 Yes? You're in the other case?  3 MR. BREEN: Yes, your Honor, and that's why I think  4 it might be helpful if I can just go over a couple of points.  5 THE COURT: All right.  6 MR. BREEN: Mr. Daly is one of lead counsels for  7 Abbott in the Texas litigation. We've been litigating it --  8 THE COURT: In state court, is that it?  9 MR. BREEN: State court, Judge. We've been  10 litigating it for three years now?  11 MR. DALY: It seems.  12 MR. BREEN: It seems longer? It seems longer, and  13 it is for more drugs. But the documents -- and I'm kind of  14 in a unique position because I see both sides, and I've  15 got --  16 THE COURT: The documents do what?  17 MR. BREEN: Pardon me, your Honor?  18 THE COURT: What do the documents do? What do they  19 say?  20 MR. BREEN: A number of things. There's about  21 three times more documents that have been produced in the  22 Texas case than have been produced here.  23 THE COURT: Sure, because there are more drugs, but  24 what are the crosscutting issues?  25 MR. BREEN: But that's not why.</p>	<p style="text-align: right;">Page 12</p> <p>1 MR. DALY: Not that they have been held back but  2 millions of documents.  3 MR. BREEN: Right. I'm saying -- I'm not saying --  4 THE COURT: So what's the third one? Just held  5 back. And they may relate to these drugs?  6 MR. BREEN: These drugs that we've used as recently  7 as two weeks ago in a 30(b)(6) deposition in Texas to make  8 critical points.  9 THE COURT: And what's the third one?  10 MR. BREEN: The third issue, your Honor, is other  11 drugs but either the same practice, or it demonstrates  12 Abbott's overall business practice in how it reports its  13 prices. And so Texas has sued on more drugs, but to the  14 extent that Abbott's --  15 THE COURT: I tell you what, why don't we do this.  16 This is a unique situation.  17 MR. BREEN: And I've already got the documents.  18 THE COURT: Why don't you take fifty, a hundred  19 representative documents from each of those categories. You  20 gave me three: A, temporal scope, B, just plain old didn't  21 produce them, and C, sort of they show business practice  22 during a relevant time period. You confer with him, show  23 him, because you luckily have two hats, so I don't have to  24 operate off of some blinders. You take those. You show it  25 to Mr. Daly. If he's persuaded, then you'll produce.</p>
<p style="text-align: right;">Page 11</p> <p>1 THE COURT: Why?  2 MR. BREEN: Number one, the crosscutting issues  3 are -- and there's, like, categories, if I can just break  4 them down. One is, Abbott has taken a position regarding  5 temporal scope in this case. It tried to take a similar  6 position in Texas, lost at the trial level, lost at the  7 appellate level, lost at the Supreme Court level. And so  8 we've got a broader temporal scope that covers the drugs at  9 issue in this case. So that's number one. And there's lots  10 of documents, and when I say "lots" --  11 THE COURT: So you're saying that it relates to  12 these drugs?  13 MR. BREEN: These drugs, and I've already got the  14 documents, so there's no burden whatsoever.  15 THE COURT: Have you conferred with him on those?  16 MR. BREEN: Your Honor, we have, and we've made  17 some progress on temporal scope but not -- but it's still the  18 same issue. What Abbott says is --  19 THE COURT: All right, so temporal scope. What's  20 the next one?  21 MR. BREEN: The next issue, your Honor, is, there's  22 just flat-out held-back documents. And I'm not going to  23 suggest it's by intent. We're talking about millions of  24 documents here.  25 THE COURT: All right, and what's --</p>	<p style="text-align: right;">Page 13</p> <p>1 Otherwise you're going to submit them in camera to me or  2 Magistrate -- is Judge Bowler involved in this case?  3 MR. DALY: Yes.  4 THE COURT: And if you win on the fifty documents  5 apiece you choose, I'm just going to say "Produce the CD."  6 So, in other words, if you're not being reasonable about  7 this, you're just going to lose. I'm not going to look at  8 millions of documents.  9 MR. BREEN: And, your Honor, may I just add one  10 request?  11 THE COURT: Yes.  12 MR. BREEN: Because understand that these documents  13 are subject to the Texas protective order. I can see them, I  14 can use them, but I cannot show them to my co- --  15 THE COURT: I understand you can.  16 MR. BREEN: But hold on, your Honor. Mr. Daly has  17 got to consent to my showing them to your Honor in camera,  18 and I just need their consent.  19 MR. DALY: I consent, your Honor.  20 MR. BREEN: And I've asked that before and have not  21 gotten an answer yet. That's the first time I got that  22 answer.  23 THE COURT: And it may be, just out of respect to  24 the Texas court, you may need to sort of file some sort of  25 a --</p>

1 MR. BREEN: Not without his consent, Judge. And  
 2 that's the critical point. All he has to do is say  
 3 "I consent" and --

4 THE COURT: So he's consented. So what you need to  
 5 do is just -- I can't rule off the cuff on this. That's  
 6 going to be impossible. What you need to do is, you have  
 7 three categories you've very neatly, succinctly set out. You  
 8 show him representative documents from -- you've seen them --  
 9 from each of those categories by yourself as intervenor. You  
 10 try and confer and see what you can work out. If you can't,  
 11 come up with a timetable, briefing timetable, motion to  
 12 compel, response. You probably need to file it under seal,  
 13 right?

14 MR. DALY: I think that's probably appropriate,  
 15 Judge.

16 THE COURT: And I'll either refer it to  
 17 Judge Bowler or take it myself, likely refer to  
 18 Judge Bowler. And because neither Judge Bowler nor I with  
 19 all these cases have time to go through a million documents  
 20 apiece, I'll look at the representative ones; and if you win  
 21 most of them, I'll just say "Turn over the CD." If you only  
 22 win a small fraction and I think you're overreaching, I'm  
 23 just going to say "Denied." So it's in everybody's interest  
 24 to try and work this out. Take your best documents.

25 MR. BREEN: But, your Honor, we will do that

1 exactly as you say, but I just want to emphasize, the whole  
 2 point here is to streamline discovery. We've got a  
 3 December 7 deadline. We have been involved in years of --  
 4 we've already fought this battle, and it's done. This is an  
 5 MDL.

6 THE COURT: I understand, but neither can you use a  
 7 lawsuit as a fishing expedition for ten more drugs that  
 8 you're interested in. So one possibility would be an  
 9 agreement that you're not going to sue for the other drugs,  
 10 and I'll order you to turn over all the CDs right now. But  
 11 you can't use discovery as a fishing expedition. That's the  
 12 big bottom line. On the other hand, you can't barnstorm and  
 13 just say it's just the four drugs, if in fact they show some  
 14 overarching business principle, and I -- because they get to  
 15 prove their case as to what management was thinking and  
 16 doing, you know, prior bad acts kind of evidence.

17 MR. BREEN: Your Honor, can I respectfully address  
 18 the fishing expedition issue and we can't prove our case  
 19 through fishing for the drugs, just very briefly? I just  
 20 want to emphasize that this is an intervening case by the  
 21 United States. And we're not fishing. I've got the boat.  
 22 The boat's got the fish in it. I just want to bring it to  
 23 the dock.

24 THE COURT: With those four drugs, but what you  
 25 can't use the discovery for is to get another fifteen drugs.

1 MR. BREEN: Your Honor, a relator can't, and I  
 2 wouldn't.

3 THE COURT: But neither can they. Unless they want  
 4 to do it under the auspices of administrative subpoenas,  
 5 neither can they. They've got to be able to have a  
 6 good-faith basis for saying they were defrauded or there was  
 7 false claims with respect to the other fifteen drugs. If  
 8 they do, amend your complaint. And you might already have  
 9 that. Do you? I don't know.

10 MS. BROOKER: Your Honor, can I just briefly  
 11 address your Honor's two points about the fishing  
 12 expedition? And, also, I don't want to leave the Court with  
 13 the impression that this is just unique to Texas. So the  
 14 solution that your Honor has proposed is not going to solve  
 15 the issue, and the problem is --

16 THE COURT: I can't rule off the bench like this,  
 17 so that's unrealistic. You haven't filed a motion to  
 18 compel. He hasn't filed an opposition. It's a huge issue.  
 19 I'm trying to cut through it right now thinking out loud. So  
 20 if you feel really strongly, you file a motion to compel, but  
 21 I can't resolve it. Right now I'll -- do you have a typed-up  
 22 scheduling order that I can look at?

23 MS. BROOKER: We don't, your Honor, because we just  
 24 agreed to some things in the hallway.

25 THE COURT: Frankly, if you agree, I'm

1 overwhelmingly likely to agree unless it essentially taxes my  
 2 resources too much, given the other cases that I'm trying to  
 3 handle here.

4 MS. BROOKER: But just a couple issues, your  
 5 Honor. With respect to -- we are just talking about the  
 6 state of Texas. In your Honor's CMOs 5 and 7, you made  
 7 available to the plaintiffs, the MDL plaintiffs, all  
 8 materials without respect to the subject drugs, all materials  
 9 that any defendant provided in any investigation, any prior  
 10 state court proceeding. The United States for some reason is  
 11 getting less discovery than a private commercial plaintiff.  
 12 We don't understand why that is.

13 THE COURT: Maybe it wasn't opposed. I don't  
 14 remember. They tended to come in by agreement as well. I  
 15 don't remember if this was opposed. I don't remember what  
 16 the debate was. I don't remember what the drugs were. You  
 17 cite my CMOs as if I've got them memorized. Between the  
 18 Neurontin case and this case, I have no memory, no present  
 19 memory of what the debate was, so that's why I can't rule off  
 20 the bat. If you want to move to compel, move to compel.  
 21 This is going to be a shortcut in this case.

22 MS. BROOKER: I do understand, your Honor. And let  
 23 say, first of all, we have, in addition to raising this issue  
 24 in the CMO, since it wasn't being addressed, we also filed a  
 25 motion to compel. That motion to compel is still pending.

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1 It's been fully briefed.

2 THE COURT: Oh, well, I didn't know that.

3 MS. BROOKER: Yes.

4 MR. DALY: It's before Judge Magistrate Bowler,  
5 your Honor.

6 THE COURT: So why don't you just let her decide?  
7 Why am I even ruling on it?

8 MR. BREEN: Your Honor, without the suggestion you  
9 made, I can't file the documents, and this is an important  
10 point. Let me just add -- can I ask one question to make  
11 sure I -- can I serve the government with this motion and  
12 including the sealed documents?

13 MR. DALY: You know, it's hard for me to say in  
14 terms of whatever it is that you're doing, Mr. Breen. I  
15 mean, our problem is this, Judge: I mean, there are temporal  
16 problems. The government is only suing us up until 2001.  
17 They cut off their complaint thereafter. Mr. Breen in Texas  
18 is suing us up to the present day. Every hour that goes by  
19 is part of Mr. Breen's suit there.

20 THE COURT: Is this based on AWP?

21 MR. BREEN: Yes, your Honor, the same case.

22 THE COURT: Let me just say, in one of my many  
23 other suits, I cut things off at 2003 because at that point  
24 the Medicare Modernization Act came through, so that's where  
25 I cut it off. I don't know where the -- that strikes me as a

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1 reasonable cutoff, at least for the time being. That's when  
2 the ASP came into play and the whole world knew about  
3 inflated AWPs, or at least anyone who was part of this world  
4 knew probably by 2001, but certainly by the time Congress  
5 passed the statute, right, everybody knew? So that would be  
6 one compromise date, a couple of years after the ending of  
7 your class. I mean, some of this should just be worked out.

8 MS. BROOKER: Judge, we have been trying to work  
9 this out for three months, and let me just explain. Here's  
10 the problem: The government, we are just standing still. We  
11 are prevented from moving further. Here's what we cannot do.

12 THE COURT: What do you want me to do now? I  
13 haven't read these motions to compel? I walked in here  
14 thinking I was just going to set deadlines. You may be right  
15 or wrong. I'm trying to cut through this, okay?

16 MS. BROOKER: Yes, your Honor. We're just asking  
17 for, frankly, what all the CMOs have said, even your most  
18 recent --

19 THE COURT: I can't rule off the bench. I haven't  
20 even read my CMOs. I don't remember what the debate was. I  
21 don't know. So I'm happy to rule. I can't do it right this  
22 second, that's all. I think this compromise will get you  
23 through a lot. And so I am suggesting that what -- you may  
24 win. You may win. I haven't read anything. I don't know  
25 about you; I don't know how you rule off the bench when you

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1 haven't read anything. I don't remember the CMOs. I don't  
2 know what the issues are. I haven't read your full-blown  
3 recent complaint. I don't know the case. This is my fault  
4 that I thought the CMO had been entered a millennia ago.  
5 I'll enter your agreed-upon CMO. Then I promise to get to  
6 your issues as soon as I read the briefs. I just don't know.

7 What I do know is, I can cut through a fair amount  
8 of this if I'm going to have you show to the other side the  
9 documents that you -- I'm sure you're a fine attorney, and I  
10 don't know whether at this point we need to get agreement to  
11 show it to the government or not. And if in fact you can't  
12 resolve it based on that, then what I'm going to do is, I  
13 will either -- I will forward all the documents over to  
14 Judge Bowler, and hopefully she'll rule on it. Does she  
15 know -- when was it fully joined, the motion to compel?

16 MS. BROOKER: The last time we had appeared before  
17 Judge Bowler it had already been fully briefed. Do you  
18 recall --

19 MR. DALY: It was in January.

20 THE COURT: She's away now, I think.

21 MS. BROOKER: Yes, that's partly the reason, I  
22 believe, for the delay.

23 THE COURT: She's been away for a couple of weeks,  
24 so --

25 MS. BROOKER: Yes, but in the meantime, just

Page 21

1 providing the status, we just wanted the Court to know that  
2 the discovery clock is ticking, and we can't speak with  
3 plaintiff's counsel in this case about this case. We can't  
4 speak with our own co-plaintiff in this case about any  
5 documents or any discovery in the case. Abbott has told us  
6 that when we cross-notice depositions in this MDL proceeding  
7 or in other cases, they're probably going to kick us out  
8 whenever they deem something irrelevant.

9 MR. DALY: I haven't said that, your Honor.

10 MR. BREEN: Counsel, your cocounsel has said that  
11 on a couple of occasions.

12 MS. BROOKER: Repeatedly.

13 THE COURT: Let me say this, that you're precluded  
14 from doing that. Okay, so we're going to go through this.  
15 We're not going to stop depositions. We're going to keep  
16 this thing going. Nothing is so sacrosanct that --

17 MR. DALY: Judge, we haven't thrown anybody out.

18 THE COURT: Everybody can stay in.

19 MS. BROOKER: We don't have the documents is the  
20 problem.

21 THE COURT: All right, you don't have the  
22 documents. We need to proceed with discovery. You need to  
23 put together all the documents that you think -- do you have  
24 some team of paralegals or someone --

25 MR. BREEN: Your Honor, we put so much money into

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1 this. I've got two huge databases of the federal documents  
 2 that they produced, the Texas documents. I've cross-walked  
 3 them. If I can show you that chart, you'll see that they're  
 4 providing -- you know, but my point is, my question is,  
 5 because this is not just Texas: Do you want me to include --  
 6 for example, you've got the state of Pennsylvania, and  
 7 they've got documents. Can I include some of their documents  
 8 in this too so you'll see the whole picture? Because there's  
 9 a lot of folks doing discovery --

10 THE COURT: I don't know enough is the thing. You  
 11 can include what you think you need to include. I am telling  
 12 you I am working -- I have thousands of documents right now  
 13 that I'm reviewing based on the bench trial that I've done.  
 14 I have the Neurontin case. I have twelve state Attorney  
 15 General cases. I have the second stage of the AWP case.  
 16 I've got these. I know the issues, so in some sense it makes  
 17 sense, but I can't sit and go through thousands of  
 18 documents. That's what I can't do.

19 MR. BREEN: I know, Judge. That's what we're  
 20 trying to prevent, and that's the point. That is the point.  
 21 We're trying to prevent that from ever happening because  
 22 these plaintiffs have done all this discovery. It's there.  
 23 Rather than be moving to compel every week to get these  
 24 documents --

25 THE COURT: I tell you what, you two confer.

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1 MR. BREEN: We will.

2 THE COURT: And give him a hundred of your best  
 3 documents from all the categories. And then if you can't  
 4 agree on what should be produced, either I or Judge Bowler  
 5 will go through it as soon as possible and jump-start this.  
 6 I will simply say this: If the issue is temporal, produce  
 7 them. I don't know what the big issue is. If the issue is  
 8 it's the drugs in issue in this, produce them. The problem  
 9 for me is, if it's unique to some individual drug that's  
 10 another drug -- and how many other drugs involved in the  
 11 other litigation?

12 MR. DALY: Over a hundred, Judge.

13 MR. BREEN: Well, there's multiple indices, but,  
 14 Judge --

15 THE COURT: So you need to be reasonable. You need  
 16 to do the crosscutting documents, and maybe you can come up  
 17 with a thousand that you think are crosscutting as opposed to  
 18 every -- I've seen these documents on Zoladex and -- you go  
 19 thousands and thousands of pages that would not have  
 20 relevance to your issues.

21 MS. BROOKER: We can't do that, your Honor, because  
 22 we don't have access to the documents, so we don't know  
 23 what's relevant.

24 THE COURT: I know. I'm simply saying there's  
 25 something called overly burdensome and overly broad. Overly

Page 24

1 burdensome does not apply because it's already on a CD.  
 2 Overly broad might. So I think what needs to happen is any  
 3 sales and marketing documents that relate to other drugs in  
 4 the time period which basically talk about marketing the  
 5 spread -- is that your big issue right now?

6 MR. BREEN: That's it.

7 THE COURT: Okay. I've seen these documents in my  
 8 other litigation. There are documents that are put out by  
 9 sales teams: "This is how you put together the spread. This  
 10 is how you put together --" That should come out, but not  
 11 every internal document about every drug. I mean, that's  
 12 overly broad.

13 Now, I've seen these kinds of documents, not from  
 14 Abbott, in fairness, from Glaxo, Bristol, Johnson & Johnson,  
 15 AstraZeneca, and Schering-Plough. I've seen the differences  
 16 in the kinds of documents, and there are crosscutting, you  
 17 know, message-to-sales-team kinds of documents, which in  
 18 general should be produced. There's very specific stuff to  
 19 each document which doesn't need to be; you know, debates  
 20 about the --

21 MS. BROOKER: We understand. I think we  
 22 understand, your Honor. Our concern is just, again, the  
 23 discovery clock is ticking. All the motions to compel have  
 24 already happened, and now the documents are just waiting for  
 25 us to use. And we are going to reinvent the wheel. We are

Page 25

1 going to be filing, I can tell you now, based on Abbott's  
 2 conduct in Texas and in this case, we are going to be filing  
 3 motion to compel after motion to compel to get the same exact  
 4 set of documents that they've already produced.

5 THE COURT: Do you feel like you now have a  
 6 good-faith basis for amending your complaint to add any  
 7 drugs?

8 MS. BROOKER: Well, your Honor, I think the problem  
 9 is that we're not necessarily using some of those documents  
 10 to amend the complaint. That's not the issue. Abbott, and  
 11 particularly even with the drugs at issue here, Abbott  
 12 markets drugs in a broad way. There are no carved-out subset  
 13 of documents on marketing, for example, that only talk about  
 14 this drug or that. It's a broad-based set of marketing  
 15 documents.

16 THE COURT: And to the extent that there are, you  
 17 should have them produced. To the extent that they're very  
 18 unique to a particular drug and a particular doctor in a  
 19 particular location, it may be overly broad if it's not one  
 20 of the drugs you're suing about.

21 MS. BROOKER: I understand, but this will require  
 22 motion, motions practice.

23 THE COURT: I can't help that. What can I do? You  
 24 can't have a hundred documents relating to a hundred drugs  
 25 when you're suing on four. But if there are crosscutting

<p style="text-align: right;">Page 26</p> <p>1 sales documents, they should all be produced.</p> <p>2 MR. DALY: That's the effort we've made, Judge. If</p> <p>3 we missed a few, and I believe that Mr. Breen -- well, you</p> <p>4 laugh, but you brought forward a hundred documents that you</p> <p>5 said weren't produced. We showed you that about half of them</p> <p>6 in fact had been produced, and we're still talking about the</p> <p>7 other half of them. Isn't that correct?</p> <p>8 MR. BREEN: I don't think that's --</p> <p>9 MR. DALY: I mean, it's not like we're not working</p> <p>10 through this. And one thing I want to correct, Judge, is any</p> <p>11 misimpression that they are stymied in their discovery. We</p> <p>12 produced -- we've made our 26(a)(1) disclosures. We've</p> <p>13 produced our other documents.</p> <p>14 THE COURT: I tell you what, since you have them,</p> <p>15 we actually have a way of breaking through this. You come up</p> <p>16 with every document you want to produce and show it to them.</p> <p>17 To the extent there are disagreements -- I mean, this is</p> <p>18 actually easier than most of my cases; you actually have</p> <p>19 them. Put them together, show them to him, and to the extent</p> <p>20 there are objections, you'll see what you really care about,</p> <p>21 and then we'll have a debate over it.</p> <p>22 MS. BROOKER: Your Honor, that's just the Texas</p> <p>23 set. There are 650,000 of them that were produced. There's</p> <p>24 also the MDL set. We cannot contact Jennifer Connolly. In</p> <p>25 fact, Abbott has threatened sanctions if we speak with them</p>	<p style="text-align: right;">Page 28</p> <p>1 MR. BREEN: The Chicago firm, Wexler's firm.</p> <p>2 MS. BROOKER: But it's just an example, your</p> <p>3 Honor. We thought we were in an MDL proceeding when we got</p> <p>4 here, and we thought we understood your Honor's October 26</p> <p>5 ruling from the bench.</p> <p>6 THE COURT: You are in an MDL, which is why I can</p> <p>7 do these things. If she wants to show you documents relating</p> <p>8 to their sales marketing efforts that are across the board,</p> <p>9 all she needs to do is -- that's why I'm here, that's</p> <p>10 exactly -- bingo, file a motion to allow her to show you the</p> <p>11 documents. Of course you can call her.</p> <p>12 MR. BREEN: Your Honor, I know this is frustrating,</p> <p>13 but we're getting somewhere. If I can just ask one more</p> <p>14 question.</p> <p>15 THE COURT: Yes.</p> <p>16 MR. BREEN: The problem is, if I call Jennifer</p> <p>17 Connolly and I say, "I need these documents," then I've got</p> <p>18 to take the working set of documents, the hottest documents.</p> <p>19 Do I have to go to Mr. Daly and say, "Can we have these</p> <p>20 documents?" That's part of the problem because we're taking</p> <p>21 our work product and taking our --</p> <p>22 THE COURT: You can go one of two ways: You can</p> <p>23 move to open the protective order so that you can see them.</p> <p>24 MR. BREEN: Okay.</p> <p>25 THE COURT: And have her gather what's relevant to</p>
<p style="text-align: right;">Page 27</p> <p>1 about what documents they have. They've already gone through</p> <p>2 a set of documents. We can't coordinate --</p> <p>3 THE COURT: You can call up Jennifer Connolly and</p> <p>4 ask her, "What documents do you have relating to your drugs</p> <p>5 or to general sales practices?"</p> <p>6 MR. BREEN: Can we see them?</p> <p>7 MS. BROOKER: Can she provide those to us? I mean,</p> <p>8 that's what we're asking for.</p> <p>9 THE COURT: Have her file a motion to open the</p> <p>10 protective order. Is she the -- who's she? She's the --</p> <p>11 MR. BREEN: Class.</p> <p>12 MS. BROOKER: We're all under a protective order in</p> <p>13 this case. The issue is --</p> <p>14 THE COURT: So have her file a motion to allow you</p> <p>15 to see the documents which she believes -- you tell her what</p> <p>16 the issues are in your case which you believe are</p> <p>17 crosscutting and apply to your case. She works for the U.S.</p> <p>18 Attorney's office, doesn't she?</p> <p>19 MS. BROOKER: Oh, no. I'm referring to plaintiffs'</p> <p>20 class counsel.</p> <p>21 THE COURT: Who's Jennifer Connolly?</p> <p>22 MS. BROOKER: She represents the private plaintiffs</p> <p>23 in the class action suit, and all I'm saying is, we can't</p> <p>24 even coordinate --</p> <p>25 THE COURT: Which firm is she with?</p>	<p style="text-align: right;">Page 29</p> <p>1 your claims, which is some work on her part, so you may have</p> <p>2 to pay her for the work, I mean, it's not part of -- or you</p> <p>3 can go and get consent from him. But you can come directly</p> <p>4 to me. That's why you are here. But I can't -- I'm not</p> <p>5 simply going to say you're across the board entitled to every</p> <p>6 document they produced in every suit, even if it involves</p> <p>7 drugs that have nothing to do with yours. I can't say that</p> <p>8 across the board. That may be overly broad. It may be</p> <p>9 unreasonable. And, as you know, for example, the Rules of</p> <p>10 Civil Procedure have been changed, so it's got to be likely</p> <p>11 to lead to relevant evidence.</p> <p>12 On the other hand, I don't know why it isn't just</p> <p>13 simpler for you to hand over the CDs.</p> <p>14 MR. BREEN: Let me do it. I've got them. Just let</p> <p>15 me show them to the government. He doesn't have to do</p> <p>16 anything but say "OK," two letters, O-K.</p> <p>17 MR. DALY: There have to be limits, Judge. I mean,</p> <p>18 even if they ask the MDL plaintiffs, I mean, they can't ask</p> <p>19 them for stuff that they're not entitled to that go beyond</p> <p>20 even the temporal limits that your Honor is suggesting or</p> <p>21 drugs. We agree that if there are documents relating to</p> <p>22 general marketing practices that would apply, that we should</p> <p>23 be producing those, and we made a good-faith effort to do</p> <p>24 that.</p> <p>25 THE COURT: For example, so it's not too narrow on</p>

1 your part, let's assume there's a marketing document for  
 2 Drug X, Y, Z, all right?

3 MR. DALY: Right.

4 THE COURT: And that's not one of the drugs here,  
 5 and it says, "What I want you to do is go out and market the  
 6 spread, and this is how the --" see, I'm going through these  
 7 documents now, like, last night -- "and here's what the  
 8 doctors will get reimbursed at, and here's what the return to  
 9 practice is, and here's what the copay will be, and here's  
 10 your profit." Even if it's Drug X, Y, Z which isn't one of  
 11 the drugs here, that should be produced.

12 MR. DALY: I agree, and we have done that. There  
 13 are no such documents, I don't believe, but anything that's  
 14 related to that we've given them.

15 THE COURT: Now, if it's an individual contract  
 16 with an individual doctor about a drug which does not have  
 17 general marketing language, I don't expect those all to be  
 18 produced.

19 MR. BREEN: I understand, Judge, but the issue is,  
 20 every document that we're talking about here I've got in a  
 21 database because we litigated this to the Supreme Court twice  
 22 to get them in Texas, okay? I've got them in a database.

23 THE COURT: Good.

24 MR. BREEN: And there's three times as many as they  
 25 produced to the federal government, but I can't show them to

1 the federal government without his approval.

2 THE COURT: Or you come back to me. That's why I  
 3 am here.

4 MR. BREEN: Judge, I understand fully.

5 THE COURT: And so you can come to me. Connolly  
 6 can come to me.

7 MR. BREEN: I understand.

8 THE COURT: You are in a great position because  
 9 you've seen it all, so you actually know what's out there  
 10 rather than some hypothetical thing. I've given you two  
 11 polar extremes: an individual contract with an individual  
 12 doctor over X, Y, Z which may show a charge-back or a rebate  
 13 or something. That seems too narrow and too specific.  
 14 Anything coming out of the sales and marketing team talking  
 15 about how you market stuff during the relevant time period  
 16 should be produced. And then the temporal scope should at  
 17 least be up to 2003 because that's when the MMA kicked in,  
 18 right? Is that right?

19 MR. DALY: Yes.

20 MR. BREEN: Correct. Well, that's when they passed  
 21 it.

22 THE COURT: Right, and then they do 85 percent of  
 23 AWP, and everybody in the world knew AWP did not reflect cost  
 24 at that point. That's actually not accurate, since I  
 25 actually saw some third-party payors here who still believed

1 it two years after the fact. But any sophisticated market  
 2 player knew -- I'll add "sophisticated," and I put the  
 3 government in that category because they were part of it --  
 4 knew in 2003 there was a different situation. And when did  
 5 you switch to ASP, 2004?

6 MR. BREEN: It took about a year to get it up and  
 7 running.

8 THE COURT: All right, so through 2003. And when  
 9 do you claim that it starts? 1991 was when Medicare started  
 10 using AWP.

11 MR. BREEN: No, Judge. '91 was when they started  
 12 the regulations, but this is a Medicare/Medicaid case, number  
 13 one.

14 THE COURT: So when did Medicaid start using it?

15 MR. BREEN: Medicaid started using AWP back in the  
 16 late '70s and the '80s. So that's one of the other issues  
 17 here, because Abbott has set another unilateral early point  
 18 on discovery, and we got a lot of the preparatory stuff. You  
 19 know how this works. I mean, you want to see the stuff that  
 20 they were --

21 THE COURT: I mean, I don't know. That's why I  
 22 don't know your complaint well enough. So Medicare started  
 23 this regulation in '91, so I don't know about Medicaid. I  
 24 know it started in the '60s in California somewhere, so --

25 MR. BREEN: Before our damage period begins,

1 Medicaid was already doing it, but there's some late '80s  
 2 documents --

3 THE COURT: When does your damage period begin?

4 MR. DALY: '91 to 2001.

5 MS. BROOKER: Except that we would have go back  
 6 prior to 1991 because there are definitely relevant  
 7 documents, particularly with respect to the subject drugs in  
 8 this case.

9 THE COURT: Going back how far?

10 MS. BROOKER: Well, we have served document  
 11 requests. I mean, Abbott should not --

12 THE COURT: Going back to when?

13 MS. BROOKER: At least back to 1988. And the  
 14 reason is --

15 THE COURT: So talk about this possible temporal  
 16 scope between '88 and 2003. I can't -- you're asking me to  
 17 microscript something I haven't seen any briefings on, and  
 18 I'm suggesting a few ways of doing it. Like, I look at you  
 19 and I say "You're golden." You've actually got these  
 20 documents, so tell me what you want to show her and try and  
 21 work it out with him. And if you can't agree, that's why  
 22 we're here.

23 MR. BREEN: Your Honor, your comments up to this  
 24 point in time, believe me, okay, you cut through a lot of it  
 25 already that I think we're going to be able to --

1 THE COURT: And with respect to Connolly, have her  
 2 move for an opening of the protective order with respect to  
 3 certain kinds of documents. You of course can talk to  
 4 whoever you want. No, you shouldn't be thrown out of a  
 5 deposition, and none of this is so super secret. On the  
 6 other hand, I have to say, it can't be a fishing expedition  
 7 to find a hundred more drugs to sue on. So that's sort of  
 8 where I'm trying to think about. Once I get into specifics,  
 9 I will get to specifics.

10 Now, let me get to Part B, which is, when are you  
 11 doing the depositions of the government people?

12 MS. BROOKER: We are doing them on an ongoing  
 13 basis. We're in the process of this right now.

14 MR. DALY: We've had a couple, your Honor. I think  
 15 we have four noticed.

16 THE COURT: Like who? Who?

17 MS. BROOKER: Well, Abbott has largely sought to  
 18 notice topics which they would call spoliation issues, your  
 19 Honor. There haven't been very many substantive depositions  
 20 that have taken place or that are noticed. They are seeking  
 21 to depose every individual that we put in an interrogatory to  
 22 find out whether their documents were preserved. For  
 23 example, there was a broad request for individuals who are  
 24 responsible or knowledgeable about the reimbursement process  
 25 in general; and then there are 30(b)(6) depositions going

1 forward over where are their files, people who left years  
 2 ago. So there are not that many substantive government  
 3 depositions.

4 THE COURT: Let me say this on the flip side of  
 5 this issue, which is, I was somewhat frustrated over the  
 6 refusal of the U.S. government to produce witnesses in the  
 7 big trial that I just went through. It all came up sort of  
 8 too late, and it wasn't specific enough, at least for the  
 9 issues there. To the extent -- Abbott, you're in Class 2?

10 MR. DALY: Yes, your Honor.

11 THE COURT: To the extent there are depositions on  
 12 a substantive basis, they should be open to everyone.  
 13 Everyone has the right to understand what the government was  
 14 doing during the time period.

15 MS. BROOKER: Your Honor, we have actually been  
 16 doing that. In fact, more than that, and there hasn't been  
 17 an opposition to this, but we've been insisting that everyone  
 18 join the depositions so that we only need to offer a witness  
 19 one time. So when there is a deposition notice, it is served  
 20 on LexisNexis, and we encourage and almost insist that other  
 21 parties appear so that we don't have to recall over and over  
 22 again a government witness. That's just not been an issue.

23 THE COURT: Because at some point I anticipate in  
 24 this case under the False Claims Act -- and I don't remember,  
 25 I think there are very complicated legal issues, very

1 complicated legal issues -- but, in any event, what Centers  
 2 for Medicare and Medicaid services understood and knew and  
 3 what they agreed to and what they didn't.

4 MS. BROOKER: And with respect to Abbott's conduct  
 5 and the Abbott drugs at issue in this case or the Dey drugs  
 6 and the Dey conduct.

7 THE COURT: Yes, and in general -- I mean, I'm  
 8 probably now more steeped in this than most people, but it  
 9 came -- the Office of the Inspector General was actually  
 10 quite persistent in trying to flag some of these issues. I  
 11 don't know if it's Abbott drugs or not. I just don't know.  
 12 And at some point, at least Mr. Scully and other people were  
 13 testifying on the Hill about this stuff. And so it's  
 14 relevant, not only to statute of limitations, but it's also  
 15 relevant to -- I think a very difficult area of the law is  
 16 when the government knows about a fraud, let's say, knows  
 17 about a fraud and it continues. I don't know what happens  
 18 when -- the solution is a very complicated one. In other  
 19 words, when the solution has to do with increasing  
 20 administrative fees and getting something through Congress, I  
 21 don't know what the answer is under False Claims Act, but at  
 22 least we need a factual record.

23 MS. BROOKER: Certainly, your Honor, and government  
 24 intends to be very open about the process. And I will remind  
 25 the Court that, you know, the United States has not sued the

1 entire pharmaceutical industry, and we have not sued Abbott  
 2 on all of its drugs. We are really focused on very discrete  
 3 conduct of a very discrete company or, you know, an  
 4 additional two companies. So we believe that the proper  
 5 focus is on what the reimbursement officials at CMS knew  
 6 about these thousand plus percent spreads by Abbott on these  
 7 particular drugs.

8 THE COURT: Are they cancer drugs?

9 MS. BROOKER: Some of those are. There's a large  
 10 antibiotic and then there are water solubles that are  
 11 generally at issue.

12 THE COURT: Are they generics?

13 MR. DALY: Yes, they're all generics, Judge.

14 THE COURT: Are they part of Track 2?

15 MR. DALY: We're in Track 2, your Honor. Yes, what  
 16 we're hearing again is that they're suggesting without coming  
 17 out and saying it that they want to try to limit us, that we  
 18 can ask the CMS people and the OIG people what they knew and  
 19 understood, but only if they knew and understood about a  
 20 5-milliliter bag of saline solution. Our position, of  
 21 course, and we talked about this when we were here in the  
 22 fall, is much broader than that. And we need to find out  
 23 what the government knew about spreads and mega spreads and  
 24 cross-subsidization and all of this information. And counsel  
 25 is correct that, you know, we're going to go ahead and we're

1 going to be talking to Mr. Scully; we're going to notice him  
 2 up for a deposition as well as other people. The other  
 3 defendants in both cases before your Honor have cross-noticed  
 4 those, so, yes, everybody is very interested in getting to  
 5 the bottom of this, and we'll be doing that.

6 THE COURT: Because it's really not so relevant to  
 7 my case that I just finished the trial on. It might be quite  
 8 relevant to this case.

9 MR. DALY: Yes, your Honor, absolutely.

10 THE COURT: I mean, it might have some relevance  
 11 but not as heartland as here.

12 Now, let me go off the record for a minute.

13 (Discussion off the record.)

14 MR. DALY: Judge, I wanted to correct a couple of  
 15 things, I mean, just to make sure to clarify. The Court has  
 16 already entered dates on this matter.

17 THE COURT: Right.

18 MR. DALY: You did this in October, so that's going  
 19 to be part of what we submit jointly to the Court today. I  
 20 think we also agreed on a mediation, but we'll have to check  
 21 that, but we'll talk about that.

22 MS. BROOKER: I feel like we did as well.

23 MR. DALY: Yes. Now, Judge, in terms of the  
 24 briefing that was submitted, we submitted a brief, I think  
 25 yesterday actually around -- yes, no, Sunday. And we have

1 been able to agree on most of the stuff that was in the  
 2 brief, in both parties' briefs back in September that we've  
 3 been fighting about. So we've agreed on the number of  
 4 interrogatories that each side can ask. We've agreed on the  
 5 request-to-admit issue about how many each side can  
 6 propound. I mean, I think we're going to have a situation  
 7 there, just to get the Court's approval, where we can do 150  
 8 sort of regular requests to admit that are really  
 9 substantive, and then otherwise where you can do additional  
 10 requests to admit where we actually admit that senator  
 11 so-and-so said X as stated in the Federal Register, attach  
 12 the document --

13 THE COURT: How many of them?

14 MR. DALY: Those will be unlimited because you have  
 15 to actually attach the document. We've agreed to that,  
 16 Judge.

17 THE COURT: You know, I was -- I don't know if you  
 18 know this -- back in the day, I was actually in the Civil  
 19 Division of the U.S. Attorney's office. I agreed to  
 20 something -- like, back in 1981, we had a superfund case  
 21 involving New Bedford Harbor. We agreed to that, thousands,  
 22 thousands. It filled Judge Young's conference room. There's  
 23 got to be a limit on it, or I know what will happen.

24 MS. BROOKER: Okay. We were pushing for  
 25 limitations in general. And the other issue that is --

1 THE COURT: If it's a hundred, I don't have a  
 2 problem with it, but just I would think that that wouldn't --  
 3 I'll read through it, but I would think that that was not a  
 4 good idea.

5 MS. BROOKER: Okay.

6 MR. DALY: Well, what we have, Judge, is, you've  
 7 seen -- you know, you get all the defendants' motions to  
 8 dismiss -- for example, all those appendices of famous things  
 9 that, you know, the President of the United States said this,  
 10 Congressmen said that, OIG. All we've done is taken those  
 11 things, and because it's from the government, we've simply  
 12 asked them to authenticate it. That's what we're talking  
 13 about, and we've already done this.

14 MS. BROOKER: We can do that by stipulation as  
 15 well.

16 THE COURT: Let me just simply say, unlimited is  
 17 not a good thing, not in a case of this magnitude. A hundred  
 18 sounds right to me with no subparts.

19 MS. BROOKER: Okay.

20 THE COURT: Because I don't see how -- you can  
 21 produce all the documents and say, do you have an objection  
 22 to the authenticity of any? And then you can do the -- you  
 23 know, like, I think it's crazy to do it that way. Unlimited  
 24 is never a good idea.

25 MS. BROOKER: I agree, your Honor. We can agree to

1 one hundred.

2 THE COURT: Yes, that makes sense.

3 MS. BROOKER: And the last remaining issue --

4 MR. DALY: But before we move off of that, we had  
 5 also agreed -- I want to make sure this is okay with the  
 6 Court -- that -- those are the authentication ones -- we had  
 7 agreed also to 150 regular requests to admit; in other words,  
 8 that don't attach the documents.

9 MS. BROOKER: But what I hear your Honor saying is,  
 10 you need to have it under limitation.

11 THE COURT: Yes, if you agree, I agree, but not  
 12 infinite.

13 MR. DALY: Right, I understand.

14 THE COURT: What I'm not going to do is what  
 15 Judge Young did, which is find a storage room for the  
 16 thousands and thousands of requests to admit. It got to the  
 17 point of ludicrous, and so limits are good.

18 MS. BROOKER: Limits are good, your Honor. We have  
 19 been pushing limits.

20 The last remaining area are depositions. In the  
 21 initial proposal, we asked for 250 hours for each side to  
 22 take in deposition hours. Instead of, you know, full days,  
 23 we just said, "Use your hours however you want. You might  
 24 want to depose this person for two hours, someone else for  
 25 twenty-one hours." They said "500 hours." Now Abbott wants

1 no deposition limitation. And I think 500 hours, which is 70  
 2 days for each side, between now and eight months from now is  
 3 not good enough. We want some sort of limitation.

4 THE COURT: Yes, you need a limit.

5 MR. DALY: Judge, here's our problem with that.  
 6 They've sued us for ten years of Medicaid. That's fifty  
 7 states. Each of those states has a financial intermediary.  
 8 They've sued us for ten years of Medicare. We have about  
 9 fifty Medicare carriers that we're seeking discovery from.  
 10 We've got ten years of CMS, HCFA, and other federal  
 11 employees, present and former. Five hundred hours is only 70  
 12 depositions of one day.

13 MS. BROOKER: Each side.

14 MR. DALY: Well, I'm only talking about what I need  
 15 to do.

16 THE COURT: Listen, just come up with a reasonable  
 17 calculation of, let's say, four hours per person or eight  
 18 hours per person and come up with an hour limit.

19 MS. BROOKER: Your Honor, what we --

20 THE COURT: Not unlimited. Just come up with a  
 21 reasonable calculation, and then you'll have to economize  
 22 internally. So let's say fifty states? So let's say eight  
 23 hours for each administrator? So that's 400 right there,  
 24 right?

25 MR. DALY: Right.

1 THE COURT: So let's say you need to do how many  
 2 officials at Medicare?

3 MR. DALY: We're not sure. They've listed about 35  
 4 in their 26(a)(1) disclosures. I don't know if those will be  
 5 the ones we depose.

6 THE COURT: So maybe four hours apiece.

7 MS. BROOKER: Well, they recommended 500 hours, and  
 8 we said 250, and today outside the courtroom we said, "Okay,  
 9 we'll go with your highest number." Five hundred hours, your  
 10 Honor, for each side between now and the end of the month is  
 11 not even feasible.

12 THE COURT: I'm not disagreeing. You need to come  
 13 up with a limit, or it will eat you. And if you can't agree,  
 14 I'll come up with one. You'll have to come up with an  
 15 estimate. So it does strike me as fair, though, if you're  
 16 suing him for fifty Medicaid states, they have the right to  
 17 take fifty Medicaid administrators, right?

18 MS. BROOKER: Well, I think, you know, there can be  
 19 a more efficient way than to depose fifty individuals.

20 THE COURT: How? I don't know. I don't know  
 21 enough about it.

22 MR. DALY: But our position, Judge, is, even if we  
 23 didn't do them all, we have to do enough to get a reasonable  
 24 cross-section to do it, and it might take more than one  
 25 person from each state. We don't know.

1 THE COURT: I'm not giving you unlimited.  
 2 Unlimited isn't happening. You're finishing it by  
 3 December 7. Even though it's the federal government, they  
 4 can't -- how many lawyers are working on this case?

5 MS. BROOKER: For this side? On our side, we have,  
 6 there's five or six of us.

7 THE COURT: So it needs to be reasonable.

8 MS. BROOKER: Yes.

9 THE COURT: Because at the end of the day, it's not  
 10 going to come down to what each Medicaid administrator did.  
 11 It's going to be, was there a fraudulent marketing of the  
 12 spread, and was there knowledge?

13 MS. BROOKER: And without the limitation, your  
 14 Honor, I mean, it's just going to cripple CMS. It's already  
 15 been very difficult for CMS because we're pulling program  
 16 people trying to implement the program to prepare for  
 17 depositions to help us find 30(b)(6) information. We've got  
 18 to limit.

19 THE COURT: I'm not that sympathetic on that. That  
 20 piece I'm not as sympathetic on. You just have to do that.

21 MS. BROOKER: Right, we've been doing that.

22 THE COURT: All right, great. Are we done?

23 MS. BROOKER: Just two more tiny little things,  
 24 your Honor.

25 THE COURT: Where are you from? Are you from

1 Washington?

2 MS. BROOKER: Yes. I'm sorry, your Honor.

3 THE COURT: No, no, that's okay. Not "I'm sorry."

4 MR. BREEN: Why are you sorry you're from  
 5 Washington?

6 MS. BROOKER: No, no, I thought you said, "Oh,  
 7 okay, you're from Washington."

8 THE COURT: No, no, no. I just don't know you.

9 MS. BROOKER: Yes, I'm with the Commercial  
 10 Litigation Branch in Washington.

11 THE COURT: I see my local folks. I just didn't  
 12 know. All right, go ahead.

13 MS. BROOKER: The other thing is, you know, we just  
 14 wanted to remind the Court that Abbott still hasn't answered  
 15 here. So while we can speculate about, obviously, what some  
 16 of their answers will be --

17 THE COURT: That's my fault, isn't it? Isn't there  
 18 a motion to dismiss?

19 MR. DALY: It's pending, your Honor, and we will  
 20 respond however the Court rules.

21 THE COURT: Is there motions to dismiss? I've got  
 22 like three Ven-A-Care cases, right? I have New York,  
 23 California --

24 MR. BREEN: No, your Honor, just two.

25 THE COURT: California and Florida, right?

1 MR. BREEN: Well, Florida is on a motion to remand  
 2 right now, but there's California, which we have actually  
 3 briefed and argued the motion in May.

4 THE COURT: Right.

5 MR. BREEN: That hasn't been ruled on yet. And  
 6 then there is the federal cases, the three federal -- soon to  
 7 be three federal Ven-A-Care cases.

8 THE COURT: And you've moved to dismiss?

9 MR. DALY: We did, your Honor. We argued that, I  
 10 believe, in the fall.

11 THE COURT: So let me tell you the issue I'm  
 12 actually struggling with, since I've got law clerk drafts on  
 13 at least a couple of these. I'm not sure it's critical, but  
 14 the issue is -- and I wasn't even sure how much it was being  
 15 pressed -- whether AWP, if you increase it to get more  
 16 remuneration for the doctor, is some sort of a kickback, it  
 17 violates the kickbacks, as opposed to offering discounts and  
 18 rebates, which strikes me as falling fully within it. But  
 19 I'm not sure it matters, just so that you can know legally  
 20 where I'm struggling. It wasn't briefed so clearly under the  
 21 various state statutes; in other words, whether or not -- I  
 22 think discounts offered to get someone to purchase may fall  
 23 within the kickback provisions, but simply publishing an  
 24 inflated AWP without a direct offer to the doctor strikes me  
 25 as an extremely close question, and I don't know what to do

1 with that. I'm not sure whether it matters that I deal with  
 2 it on a motion to dismiss because if you fall under one, I'm  
 3 not sure it's going to get you to Step B, but I'm struggling  
 4 with it. I haven't found any case law on it. I found no  
 5 regulatory guidance on it. And even the OIG fudged it in its  
 6 compliance manuals. So a heads-up, and I haven't forgotten  
 7 about you, but I'm --

8 MR. BREEN: And that's definitely in the California  
 9 case and in this case, that issue.

10 THE COURT: That issue is a big one, and I'm  
 11 worried about getting it wrong. I'm not sure that I need to  
 12 get to it because, as I said, offering discounts, at least on  
 13 a motion to dismiss stage, might be enough. But I'm having  
 14 trouble with, if you've got an AWP out there and you market  
 15 it -- in other words, you explain what the reimbursement  
 16 spread is -- but you're not actually the one paying the  
 17 amount of money and you're not actually offering the amount  
 18 of money, it's a very difficult question.

19 MR. BREEN: Direct or indirect.

20 THE COURT: Huh?

21 MR. BREEN: Direct or indirect, in cash or in kind.

22 THE COURT: I know that's your argument, but  
 23 there's not actually an offer of money. So it's hard, and  
 24 it's hard under the state statutes, and it's hard under the  
 25 federal statutes. Have you weighed in on this yet, the

1 government?

2 MR. GOBENA: Yes, we have.

3 THE COURT: And Your position is?

4 MR. GOBENA: We take the position that, just as  
 5 Mr. Breen said, that it can be an offer that's direct or  
 6 redirect. And remuneration, there's a broad definition of  
 7 what remuneration is. It's not necessarily limited to a cash  
 8 transaction. The offering of potential profit could  
 9 constitute remuneration under the statute, so --

10 THE COURT: It's hard. No case has gone that far,  
 11 at least that we can find. No case has addressed this, so  
 12 that's the one I'm just worried about it because it could  
 13 have sweeping ramifications, if you want to know what's  
 14 holding it up.

15 MR. DALY: I think that it stretches the  
 16 Anti-Kickback Statute too far, your Honor.

17 THE COURT: I know you do, and can I say that you  
 18 both have fabulous arguments on this particular one, and I'm  
 19 sort of stuck on it. But, in any event, it should not hold  
 20 up discovery. Okay, thank you.

21 MR. BREEN: But the point is, your Honor, the more  
 22 we can coordinate the California case with the federal case,  
 23 I think the better for everybody concerned.

24 THE COURT: Say it again?

25 MR. BREEN: The more we can coordinate the

1 California Ven-A-Care case with the other Ven-A-Care cases,  
 2 it is going to expedite things because I've got the same  
 3 lawyers working --

4 THE COURT: But nothing's being held up, right?  
 5 Discovery is happening while --

6 MR. BREEN: No, it is. You've got a stay. There's  
 7 no stay on their intraparty discovery in the federal case,  
 8 but you stayed intraparty discovery in the California case.

9 THE COURT: All right, so I should make that a  
 10 priority.

11 MR. BREEN: And if we could at least get the  
 12 intraparty discovery issue resolved, we could at least  
 13 coordinate discovery on that.

14 THE COURT: Okay, thank you. Now, you'll give me  
 15 that stuff. Whatever you can agree on, though, at least let  
 16 me enter as soon as possible.

17 MS. BROOKER: Yes, we will submit it tomorrow.

18 THE COURT: Good. Thank you.

19 MR. DALY: Thank you, your Honor.

20 MS. BROOKER: Thank you.

21 (Adjourned, 11:05 a.m.)

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1 C E R T I F I C A T E  
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3

4 UNITED STATES DISTRICT COURT )  
5 DISTRICT OF MASSACHUSETTS ) ss.  
6 CITY OF BOSTON )  
7

8 I, Lee A. Marzilli, Official Federal Court  
9 Reporter, do hereby certify that the foregoing transcript,  
10 Pages 1 through 49 inclusive, was recorded by me  
11 stenographically at the time and place aforesaid in Civil  
12 Action No. 01-12257-PBS, MDL No. 1456, In re: Pharmaceutical  
13 Industry Average Wholesale Price Litigation, and thereafter  
14 by me reduced to typewriting and is a true and accurate  
15 record of the proceedings.

16 In witness whereof I have hereunto set my hand this  
17 5th day of March, 2007.

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21  
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